

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 14, 2006

STATE OF TENNESSEE v. BOBBY J. RUSSELL

**Direct Appeal from the Criminal Court for Anderson County
No. A4CR0204 Donald R. Elledge, Judge**

No. E2006-00884-CCA-R3-CD - Filed February 15, 2007

The appellant, Bobby J. Russell, pled guilty in the Anderson County Criminal Court to aggravated assault and agreed to a six-year sentence with the manner of service to be determined by the trial court. After a sentencing hearing, the trial court ordered that he serve his sentence in confinement. On appeal, the appellant claims that the trial court erred by denying his request for alternative sentencing. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

J. Thomas Marshall, Jr., Clinton, Tennessee, for the appellant, Bobby J. Russell.

Michael E. Moore, Acting Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; James N. Ramsey, District Attorney General; and Jan Hicks, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At the appellant's guilty plea hearing, the State presented the following factual account of the crime: On August 18, 2003, the appellant and his half-brother, Tommy Russell, went to the home of Sam and Charlotte Poston.¹ The Russells were upset that James Russell, their deceased

¹Because the codefendants share the last name "Russell" and the victims share the last name "Poston," we have elected to utilize first names for the purpose of brevity. We intend no disrespect to these individuals.

brother, had given Charlotte a power of attorney prior to his death and that Charlotte was involved with the administration of his estate. Charlotte had taken care of James, who was her brother-in-law, while he was sick.

When the appellant and Tommy arrived at the Poston home, Sam was outside doing yard work. An argument ensued, and the Russells showed the Postons what appeared to be a bomb. The Postons were afraid, and Sam tried to get Charlotte to go back into the house. The appellant hit Sam with his fists, and Tommy pulled out a knife and stabbed Sam twice in the abdomen. The brothers forced Charlotte to write them a check for seven hundred fifty dollars, and Sam was able to run to a neighbor's house for help. The appellant and Tommy were charged with especially aggravated robbery, a Class A felony, and pled guilty to aggravated assault, a Class C felony.

At the appellant's and Tommy's sentencing hearing, Wade Adcock testified that he prepared their presentence reports. Adcock met with the appellant, and the appellant was articulate but had communication problems. Adcock stated that neither the appellant nor Tommy expressed remorse for the crime, but Adcock "got the distinct impression that they felt like they could have handled it better especially [the appellant]." On cross-examination, Adcock testified that about thirty years ago, the appellant served six months in the military but was honorably discharged after an injury. He said that the injury caused some permanent brain damage and that the appellant began receiving veterans administration (VA) benefits. He stated that VA hospital records showed the appellant had been diagnosed as a paranoid schizophrenic, that the appellant had a limited ability to read and write, and that the appellant appeared to have been a follower all of his life. Although a background check did not reveal any prior convictions, the appellant told Adcock that he had been convicted of driving under the influence (DUI) in 1979.

Sam Poston testified that at the time of the crime, he had never met the appellant but had met Tommy one time. When the Russells arrived at his home, Tommy told the Postons that he was tired of waiting on the money from his brother's estate, and Charlotte told Tommy that the estate had not been settled yet. The Russells showed the Postons a metal briefcase containing what appeared to be a bomb. The bomb, which turned out to be fake, consisted of three sticks of dynamite taped together and a couple of switches. Tommy turned on a switch, and a red light came on. The appellant hit Sam once on the jaw, and Tommy stabbed Sam twice. Sam fell to the ground, and Tommy told the appellant to stand over Sam to prevent him from getting up. While Sam was lying in the grass, Tommy held a knife to Charlotte's throat and forced her into the house. The appellant told Sam that he would kick Sam's "g.d. brains out" if Sam tried to get up. At some point, the appellant walked back to the driveway, and Sam was able to stand up and run to a neighbor's house. Sam stated that although Tommy was the leader, he wanted both men to serve time in confinement. He said that he had a hernia that would have to be repaired, that part of his thigh remained numb, and that the Russells "just ruined [our] lives."

On cross-examination, Sam testified that a few days before the crime, a threatening note from

Tommy appeared in the Postons' mailbox, and the Postons gave the note to the sheriff's department. On the day of the crime, Sam was in the backyard when the appellant came into backyard and told Charlotte that she had a package out front. Sam acknowledged that before the stabbing, he swung an extension cord at the appellant and Tommy. He said he swung the cord "to fend them off" and because Tommy was threatening to detonate the bomb.

Chris Russell, Tommy Russell's son, testified on Tommy's behalf. On cross-examination, he testified that "you can't get a clear answer from [the appellant] because his mind's not right" and that the appellant "does his own thing."

Tommy Russell testified that he was fifty-seven-years-old. He acknowledged that due to his memory and medical condition, he was "a little bit on shaky ground" as to what he pled guilty to. He said his mind was "cloudy," and he apologized to the victims "[i]f I've done anything wrong to offend you." On cross-examination, he testified that the appellant admitted putting the threatening note in the Postons' mailbox.

The appellant testified that he had lived with Tommy for about a year. Prior to living with Tommy, the appellant lived in a camper, which he parked on Tommy's property. He said that he had suffered a heart attack, that his blood pressure was abnormal, and that he took medication. The appellant said that while he was jogging in the army, he tripped and fell on a sidewalk. The appellant was told he "came down with a case of schizophrenia or something like that," and he said he received disability checks for the injury. He said that he suffered from impaired judgment but that he had never been in trouble with the law except for a prior DUI conviction many years ago. The appellant stated that he put the threatening note in the Postons' mailbox and that he was sorry Sam Poston was stabbed but that he never attacked, hit, or punched Sam.

On cross-examination, the appellant acknowledged that he had been diagnosed with paranoid schizophrenia. He stated that he remembered going to the Postons' home on the day of the crime but that he did not remember Sam Poston being stabbed or hit. He said that Tommy bought the metal briefcase at Lowe's, that a piece of the fake bomb came from a heart machine, and that the bomb looked like a child's toy.

The State introduced the appellant's presentence report into evidence. According to the report, the then fifty-year-old appellant dropped out of high school after completing the eleventh grade, never obtained his GED, was divorced, and had two adult sons. In the report, the appellant described his physical health as poor, stating that he had a heart attack in 2004 and had a stint implanted in an artery. He also described his mental health as poor, stating that he had been diagnosed with paranoid schizophrenia and medicated periodically. According to the report, the appellant has a fifty percent disability and has been unemployed due to his army-related injury. However, the report also states that at one time, the appellant was able to do odd jobs such as lawn maintenance.

The trial court stated that it considered the appellant's offense a "serious criminal offense"

and that the appellant “was candidly given a break in the reduction.” The trial court believed this was “a very violent crime,” noting that Sam Poston was stabbed and that a knife was held to Charlotte Poston’s throat. The trial court stated that it was offended by the appellant’s claim he did not hit Sam Poston and concluded that the appellant should serve his sentence in confinement.

II. Analysis

The appellant claims that the trial court should have granted his request for probation or some other form of alternative sentencing. In support of his argument, he contends that his lack of a prior criminal record and his successful handling of his mental illness are reliable predictors of his potential for rehabilitation. He also contends that his cooperation with his probation officer’s preparation of his presentence report and Wade Adcock’s testimony demonstrate that he is “not a threat to society and certainly is not one for whom state prison space should be reserved.” The State contends that the trial court properly denied the appellant’s request for alternative sentencing. We agree with the State.

Appellate review of the length, range or manner of service of a sentence is *de novo*. See Tenn. Code Ann. § 40-35-401(d). In conducting its *de novo* review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Initially, we recognize that an appellant is eligible for alternative sentencing if the sentence actually imposed is eight years or less. See Tenn. Code Ann. § 40-35-303(a) (2003).² Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6) (2003). In the instant case, the appellant is a Range I, standard offender convicted of a Class C felony; therefore, he is presumed to be a favorable candidate for alternative sentencing. However, this presumption may be rebutted by “evidence to the contrary.” State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). The following sentencing considerations, set forth in

² Effective June 7, 2005, the legislature amended several provisions of the Criminal Sentencing Reform Act of 1989. However, the appellant committed the crime in this case before June 7, 2005, and he did not “elect to be sentenced under the provisions of the act by executing a waiver of his *ex post facto* protections.” Tenn. Code Ann. § 40-35-114, Compiler’s Notes. Therefore, the 2005 amendments do not affect the appellant’s case, and we have cited the statutes that were in effect at the time the appellant committed the offense.

Tennessee Code Annotated section 40-35-103(1), may constitute “evidence to the contrary”:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Zeolia, 928 S.W.2d at 461. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. See Tenn. Code Ann. § 40-35-103(2), (4). Further, the “potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed.” Tenn. Code Ann. § 40-35-103(5).

The trial court’s explanation for denying the appellant’s request for an alternative sentence demonstrates that the trial court believed confinement was necessary in order to avoid depreciating the seriousness of the offense. The guilty plea hearing and the sentencing hearing transcripts reveal that the appellant and his brother believed the Postons owed them money from James Russell’s estate and that they made a fake bomb in order to scare the Postons. When the Russells arrived at the Postons’ home, the appellant hit Sam Poston with his fists, and Tommy Russell stabbed Poston twice. Tommy also threatened to detonate the bomb, held a knife to Charlotte Russell’s throat, and forced her to write a check. We agree with the trial court’s determination that confinement is necessary to avoid depreciating the seriousness of the offense. See Zeolia, 928 S.W.2d at 462 (stating that in denying full probation to avoid depreciating the seriousness of the offense, the criminal act should be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree). The trial court’s explanation also demonstrates that it believed the appellant was being untruthful when he said he did not hit Sam Poston. We note although the appellant claimed he did not remember Sam being stabbed, he remembered many other details of the crime. This selective memory casts doubt on his credibility and reflects poorly on his potential for rehabilitation. The trial court properly denied the appellant’s request for alternative sentencing.

III. Conclusion

Based upon the record and the parties’ briefs, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE